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Opinion Committee

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Office of the Attorney General
Attn: Opinion Committee Division
Price Daniel, Sr. Building
209 West 14th and Colorado Street
P.O. Box 12548
Austin, Texas 78711-2548

Re: Attorney General's Opinion Request

Dear Assistant Attorney General:

Pursuant to a request by the Parker County Commissioners' Court, I am asking for an Attorney General's Opinion regarding the following question:

Would any work performed for the County by the County Attorney's Office during the time that the County Attorney served simultaneously as County Attorney and as a Municipal Judge for a city in Parker County be void?

Attached hereto is a complete brief which contains the facts of our particular situation and my conclusions with supporting analysis. Thank you for your assistance in this matter, and I look forward to hearing from you.

Sincerely,

Don Schnebly

Don Schnebly
District Attorney
43rd Judicial District
Parker County, Texas

DS:edl

BRIEF SUPPORTING OPINION REQUEST

This brief is intended to fully inform the Attorney General's Office of the factual situation from which the current question arises and to assist it to render its opinion.

FACTUAL BACKGROUND

The present Parker County Attorney, Mr. Wilson, has been the Municipal Court Judge for the City of Willow Park, for approximately the last eight years. The position of Municipal Court Judge for the City of Willow Park, Parker County, Texas, is a paid position which is appointed by the Willow Park City Council.

After assuming the elected post of Parker County Attorney on January 1, 1997, Mr. Wilson did not resign his position as Municipal Court Judge and continued to act as both Municipal Court Judge for the City of Willow Park without compensation and the Parker County Attorney with compensation until approximately November, 1997. In November, Mr. Wilson resigned his post as Municipal Court Judge for the City of Willow Park and continues to serve as County Attorney. Subsequently, the Commissioners' Court of Parker County, Texas, approved a motion for the Parker County District Attorney to request an Attorney General's Opinion regarding the following question.

QUESTION PRESENTED

Would any work performed for the County by the County Attorney's Office during the time that the County Attorney served simultaneously as County Attorney and as a Municipal Judge for a city in Parker County be void?

CONCLUSION

Parker County should not face any negative consequences from the current Parker County Attorney also serving as the Municipal Court Judge for the City of Willow Park, Texas, due to the fact that once this person was qualified and accepted the position of Parker County Attorney, under the doctrine of "automatic resignation," he effectively resigned his post as Municipal Court Judge. Therefore, he was not serving in a dual capacity contrary to the Texas Constitution. Consequently, no act of this person as Parker County Attorney could be affected by this apparent dual role.

SUPPORTING ANALYSIS

Article XVI, section 40 of the Texas Constitution states, "No person shall hold or exercise at the same time, more than one civil office of emolument..." A "civil office" is an office that pertains to the exercise of the powers or authority of civil government. State ex rel Hill v. Pirtle, 887 S.W.2d 921, 931

(Tex. Crim. App. 1994). An "emolument" is a pecuniary profit, gain or advantage. Id.

The doctrine of "automatic resignation" states that "if a person holding an office is elected or appointed to another (where the two offices cannot be legally held by the same person) and he accepts and qualifies as to the second, such acceptance and qualification operate, ipso facto, as a resignation of the former office." Pruitt v. Glen Rose Independent School Dist. No. 1, 84 S.W.2d 1004, 1006 (Tex. App.--Waco 1935, no writ) and cases cited therein. See Centeno v. Inselmann, 519 S.W.2d 889, 890 (Tex. App.--San Antonio 1975, no writ) and cases cited therein. In other words, "where the holder of one office accepts and qualifies for a second, he automatically relinquishes the first office." Centeno, 519 S.W.2d at 890 (emphasis supplied).

The position of a municipal court judge is a civil office of emolument. Attorney General Opinion JM-333 (1985). See State v. Brinkerhoff, 17 S.W. 109 (Tex. 1886). Although I was unable to find any direct authority which states that the office of County Attorney is a civil office of emolument, implicit authority to support the contention that the office of County Attorney is such an office can be found in Eastland County v. Hazel, 288 S.W. 518 (Tex. App.-- El Paso 1926, writ ref'd). The court there pointed out in the disposition of the unrelated question before it that Mr. Hazel was elected and gave a bond as the Eastland County Attorney, and there is no way in which he could, under the Texas Constitution, hold two offices of profit at the same time. Id. at 521.

A public "officer" is authorized by law to independently

exercise functions of either an executive, legislative or judicial character, and the exercise of this power by the officer is subject to revision and correction only according to the standing laws of this State. State ex rel Hill, 887 S.W.2d at 931. Article V, section 21 of the Texas Constitution states that the County Attorneys shall represent the State in all cases in the District and inferior courts in their respective counties unless there is a District Attorney in that county. The interpretive commentary to Article V, section 21 of the Texas Constitution states that County Attorneys are among the public prosecutors found in American state government. Thus, it can be argued that the office of County Attorney is a public office because it is vested with performing functions of a judicial character, namely, that of prosecuting offenders for crimes committed within its jurisdiction, and also the fact that the office of County Attorney is an elected position. Therefore, because the office of County Attorney is a civil office of emolument, it falls within the constitutional prohibition against dual office-holding.


A previous Attorney General Opinion seems to have already answered the current question. Attorney General Opinion, JM-333 (1985). In this opinion, the question presented was whether a municipal court judge could continue to serve as judge after he had been appointed county auditor. Id. After discussing the prohibition of Article XVI, section 40 of the Texas Constitution and the "automatic resignation" doctrine, your office concluded that regardless of whether the municipal judge accepted payment for his services, the Constitution prohibits a municipal court judge who qualifies for the position of county auditor from

continuing to serve as municipal judge. Id.

The doctrine of "automatic resignation" in effect makes it impossible to violate Article XVI, section 40 of the Texas Constitution. This is true because a person's acceptance of a second office acts as an automatic vacation of the office currently held. Centeno, 519 S.W.2d at 889. Therefore, that person is only holding one office, the one subsequently accepted, and has no authority to continue to act as the person holding the office vacated. Conversely, as only holding the second office, all acts as that office-holder would be unaffected by that person continuing to act as the holder of the office vacated.

The above authority instructs that Mr. Wilson's acceptance of the position of Parker County Attorney operated as an automatic vacation of his bench. The vacation of his position as municipal judge resulted in Mr. Wilson only holding one office, that of Parker County Attorney. Consequently, there should be no negative consequences experienced by Parker County for Mr. Wilson continuing to act as a municipal court judge after he accepted his position as Parker County Attorney.

Respectfully submitted,


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